United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
KENNETH H. VOLK

75-7274

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7274

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,
Plaintiff-Appellant,

—against—

THE M/V MARATHONIAN, her engines, etc. and
EUROPA SHIPPING CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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Statement of Issues Presented for Review

Federal Commerce, time charterer of the ROLWI, sued the MARATHONIAN and her owner Europa for alleged financial losses sustained by reason of the collision between the ROLWI and the MARATHONIAN on Lake Michigan on October 2, 1973. Europa moved to dismiss the complaint for failure to state a claim upon which relief could be granted, citing *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927). The District Court, finding that *Robins* squarely applies, granted the motion.

Appellant Federal Commerce concedes that *Robins* applies, but in justification of this suit argues that *Robins* "no longer has any vitality and would not be followed by

the Supreme Court today" (B. 5). In sum, this suit represents a frontal attack on *Robins* in an effort to change the law.

That being so, the role left to this Court is severely limited. For as this Court has repeatedly said, only the Supreme Court has the power to overrule its own decisions. *Reliable Transfer Co., Inc.* v. *The United States,* 497 F.2d 1036 (2d Cir. 1974); *Salerno* v. *American League of Professional Baseball Clubs,* 429 F.2d 1003 (2d Cir. 1970).

While no further argument seems necessary, we will nevertheless respond to the several points raised by Appellant.

ARGUMENT

POINT I

Robins was correctly decided.

In *Robins* the Supreme Court held that a time charterer has no right of action against a tortfeasor who has negligently damaged the chartered vessel. That is the "Rule" of *Robins.** In an effort to build symmetry into the law, the Rule has sometimes been broadly characterized as denying any recovery for negligent interference with contractual rights. But the Court did not espouse any such doctrine. Justice Holmes' exact words were (p. 309):

> "[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one

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* We also agree with the District Court's definition of the Rule as stated at pp. 11a-13a.

> man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."

That is not the same as saying there can be no recovery for negligent interference with contractual rights. It is this expanded, over-generalized version of the Rule which has been subject to some criticism by the commentators.

When we deal with the cut-off point in the cause-and-effect chain of damage resulting from a negligent act, it is tempting to devise rules or catch-phrases which can be applied generally. It is a subject which has long tantalized lawyers, scholars and judges, all seeking some common thread to be universally used to determine the cut-off point. But the goal is elusive and the effort, we submit, futile. Each set of facts must be dealt with independently. Perhaps Judge Andrews came closest to the truth in *Palsgraf* v. *Long Island RR,* 248 N.Y. 339, 354-5 (1928) (dissenting opinion):

> "It is all a question of expediency . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Recently, this Court took the same practical approach in *Petition of Kinsman Transit Company,* 338 F.2d 708 (2d Cir. 1964) when Judge Friendly wrote (p. 725):

> "Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity."

In *Robins* the Supreme Court drew the cut-off line so as to exclude the time charterer. This result is practical and fair for at least three reasons.

1. As Appellant points out, time charter rates fluctuate widely (B. 9). While a tortfeasor may be presumed to have knowledge that many vessels operate under charter today, just as they did in 1927 when *Robins* was decided, he certainly cannot be presumed to know the charter *rate*. It is the *rate* which is of significance, not the fact of the charter itself. If at the time of the collision the rate is lower than the market, the time charterer sustains a loss because he must obtain replacement tonnage at a higher cost. On the other hand if the rate is higher, then the time charterer gains, because he is temporarily relieved of a burdensome contract and can charter replacement tonnage at a lower cost. Thus, it is a mere fortuity that in this case Federal Commerce has allegedly sustained an economic loss.

2. If the line is not drawn so as to exclude time charterers what then are the rights of the subcharterer? It is not at all unusual for vessels to operate under an intricate system of charters, including time charters, voyage charters, and space charters. We might for example have a situation where the vessel is under long-term time charter at a higher rate than a short-term sub-time charter. As a result of collision the time charterer might benefit, but the sub-time charterer might sustain an economic loss. These problems, of course, could be multiplied indefinitely.

3. By the very nature of the contract, a time charterer should be excluded. He has no control over the vessel, no say in its management or operation at sea, and bears none

of the risks of liability resulting from negligent navigation. He has no physical involvement. All of these factors distinguish him from other interests which have a much closer relationship to the vessel and which are allowed recovery, such as a demise charterer, a cargo owner, a passenger, or a crew member. See footnote 2 of the District Court's opinion (12a).

The Supreme Court undoubtedly took all of these factors into consideration when deciding *Robins,* and concluded that "The law does not spread its protection so far" (p. 309).

POINT II

Robins has been consistently followed by our Courts and the same rule applies in England.

Federal Commerce asks this Court to recognize "modern" tort principles and change *Robins.* But there is no evidence that *Robins* is outmoded. There has been not the slightest indication from the Supreme Court that it is looking for an opportunity to change the law, nor does Federal Commerce cite any such authority. To the contrary, it is clear that *Robins* has been consistently followed by our Courts. *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.,* 153 F.2d 869, 871 (2d Cir. 1946); *Rederi A/B Soya* v. *Evergreen Marine Corp.,* 1972 AMC 1555, 1563-6 (E.D. Va. 1971); *Dampskibsaktieselskabet den Norske* v. *Intalco Aluminum Co.,* 306 F. Supp. 170 (W.D. Wash. 1969) *aff'd.,* 457 F.2d 889 (9th Cir.), *cert. denied,* 409 U.S. 1024 (1972). The same rule is followed in England. *Chargeurs Reunis* v. *English & American Shipping Co.,* 9 Ll. L. Rep. 90 (Adm. Div.) *aff'd.,* 9 Ll. L. Rep. 464 (C.A. 1921); *Scrutton on Charterparties and Bills of Lading* 49 (18th Ed. 1974).

There is no basis for changing a rule which has been so broadly accepted for such a long time. To do so would require that the entire maritime industry readjust the allocation of risks in very fundamental areas, a result which is contrary to the desired establishment and continuation of stability in the law dealing with commercial matters.

POINT III

Appellant's arguments have no support in legal authority.

Federal Commerce misconstrues the District Court's decision when it argues (B. 5) that: "The District Court agreed with Appellant's position . . ." Judge Canella did not imply that he would reach a different conclusion from *Robins* were the matter one of first impression. The general tone of his opinion is quite the opposite. He said (13a):

> "Contrary to plaintiff's assertion, *Robins* correctly reflects the present state of law concerning negligent interference with contract * * *"

The Court then goes on to cite the Restatement (2nd) of Torts §766B, quoting from the Explanatory Notes as follows (14a):

> "It seems more likely, however, that it is the character of the contract or prospective interest itself which has led the courts to refuse to give it protection against negligence. They apparently have been influenced by the extremely variable nature of such relations, the fear of an undue burden upon defendant's freedom of action, the probable disproportion between the large damages which might be recovered and the extent of

> defendant's fault, and perhaps in some cases the difficulty of determining whether the interference has in fact resulted from the negligent conduct."

As for this Court's two *Kinsman* decisions* they do not stand for any change in the law of tort as claimed by Appellant. Certainly, *Kinsman II* does not "in effect recognize that the decision [*Robins*] has no continuing validity and would presumably not be followed by the Supreme Court today." (B. 7) Initially, it must be recognized that neithe *Kinsman* case, nor for that matter any other authority cited by Appellant in support of its position, involves the rights of a time charterer. To that extent, at least, they are irrelevant. *Kinsman* did, however, present intriguing problems of cause-and-effect in a maritime setting, again prompting the never-ending search for the common thread. But when all is said and done, the holding of *Kinsman I,* so far as pertinent here, was simply that the flood victims could recover (Judge Moore dissenting), and the holding of *Kinsman II* was that Cargill and Cargo Carriers could not recover because their injuries "were too 'remote' or 'indirect' a consequence of defendants' negligence" (p. 824).

The unreported decision in *Chicago & Western Indiana R.R.* v. *The Buko Maru,* copy of which is annexed to Appellant's brief, deals with the rights of certain railroads which were proprietors and/or operators of a railroad bridge. The legal title to the bridge was in the name of Chicago & Western Indiana Railroad Co., but the District Court expressly found that that was not the operating railroad. Thus, we have a situation analogous to a de-

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* *Petition of Kinsman Transit Company,* 338 F.2d 708 (2d Cir. 1964); *Petition of Kinsman Transit Company,* 388 F.2d 821 (2d Cir. 1968).

mise charter, where the ship is under the control of someone other than the owner. The Court stated that under these circumstances the granting of damages to the user railroads is not inconsistent in principle with *Robins*. This decision was apparently never appealed. The Seventh Circuit decision cited by Appellant concerns a totally different aspect of the matter and expressly refers to another decision of the District Court reported at 348 F. Supp. 549 (N.D. Ill. 1972).

In the recent English case of *Spartan Steel & Alloys Ltd.* v. *Martin & Co. Ltd.*, [1972] 3 All E.R. 557 (C.A.), cited by Appellant (B. 11), negligent damage was done to a cable supplying electrical power to a steel plant, as a consequence of which a "melt" was damaged. The dispute centered on the measure of damages. Plaintiff, owner of the steel plant, claimed not only the damage to the "melt" which was in the furnace at the time of loss of power, but also for the loss of use of the furnace thereafter, until power was restored. The Court denied to plaintiff the loss of use claim and allowed only the consequences of the physical damage. In the course of his opinion Lawton LJ expressly reaffirmed the famous case of *Cattle* v. *Stockton Waterworks Co.*, [1874-80] All E.R. 220, where Blackburn J. said:*

> "The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract, in consequence of this injury to Knight's property. We think this does not give him any right of action."

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* See also *Elliott Steam Tug Co.* v. *Shipping Controller*, [1922] 1 K. B. 127, 139, cited by the Court with approval.

Then Judge Lawton went on to say (p. 572):

> "Earlier in his judgment he [Blackburn J.] had said 'No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited.' There is still no authority directly in point today. Blackburn J's judgment has been cited with approval and followed many times . . . For nearly 100 years now contractors and insurers have negotiated policies and premiums have been calculated on the assumption that Blackburn J's judgment is a correct statement of the law; and those affected financially by the acts of negligent contractors have been advised time and time again that mere financial loss is irrecoverable."

Thus, *Spartan Steel* does not stand for the proposition urged by Appellant in this case. To the contrary, it stands for just the opposite, and is squarely in accord with *Robins*.

Other authorities cited by Appellant are either clearly distinguishable, or inapposite.

POINT IV

The complaint does not allege intentional tort.

Appellant made the same argument to the District Court, but Judge Canella thought so little of it that he ignored it. The complaint (4a) alleges that the collision "was caused in whole or in part by fault and negligence of Defendant." There is no mention of intentional wrongdoing, or even of gross negligence. Appellant seizes upon the words "highly excessive rate of speed in dense fog" to support its argument, but this somewhat redundant phrase, in sub-

stance a standard allegation in admiralty pleadings, is nothing more than a specification of the preceding claim of "fault and negligence." If Appellant had wanted to assert "intentional" or "gross" misconduct, it would have been a simple matter to say so in the complaint. Appellant's bootstrapping effort to change the meaning of the words at this stage is to no avail.

CONCLUSION

The decision of the Lower Court dismissing the complaint should be affirmed.

August 20, 1975

Respectfully submitted,

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